

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

OCT 31 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2005-0176
Appellee,)	2 CA-CR 2005-0208
)	(Consolidated)
v.)	DEPARTMENT A
)	
MARYANNE CHISHOLM,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
Appellant.)	Rule 111, Rules of
)	the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021306

Honorable Christopher C. Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann

Tucson
Attorneys for Appellee

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Attorneys for Appellant

P E L A N D E R, Chief Judge.

¶1 After a bench trial, Maryanne Chisholm was convicted of conspiracy and two counts of fraud in insolvency. The trial court suspended imposition of sentence, placed

Maryanne on concurrent probationary terms, the longest for seven years, and ordered her to serve twelve months in jail as a condition of her probation. She raises multiple issues on appeal, none of which warrants reversal. Therefore, we affirm.

Background

¶2 We view the facts and reasonable inferences from them “in the light most favorable to sustaining the verdicts.” *State v. Carlos*, 199 Ariz. 273, ¶ 2, 17 P.3d 118, 120 (App. 2001). Maryanne and her husband Mark served as officers, directors, and shareholders of Safari Media, Inc. (“Safari”). At trial, an attorney who had represented Safari testified that “Mark and Maryanne [as individuals] were indistinguishable from Mark and Maryanne the officers, directors and majority shareholders of Safari Media, Inc.” An investigating accountant found that ninety-eight percent of the money in the Chisholms’ personal checking account originated from Safari.

¶3 After investigating Safari, the Arizona Corporation Commission (ACC) issued a cease and desist order in November 1999. In June 2000, on the state’s petition, the Maricopa County Superior Court (the receivership court) appointed a receiver for the company. The receivership applied to all property owned by Safari. The court ordered Safari and the Chisholms to “deliver over to the receiver . . . [p]ossession and custody of all funds, assets, property owned beneficially or otherwise, and all other assets, wherever situated.” The court also issued a temporary restraining order that pertained to both Safari’s property and the Chisholms’ personal property.

¶4 Before those orders were entered in June 2000, the Chisholms purchased three paintings, titled “Spring,” “Summer,” and “Faun and Bacchante,” for \$480,000 from an art gallery, charging them to Mark’s personal American Express card. After the gallery received payment in full from American Express, it shipped the paintings to Matt Farruggio in Tucson. It did so at Maryanne’s request because she was “having some trouble at her house.”

¶5 Also before the receivership orders were entered, Mark in early 2000 bought a residence in Tempe as his sole and separate property. The attorney who represented the receiver discovered Mark had used Safari funds to purchase the property and asked Mark’s lawyer to transfer the property to the receivership. Instead, in late August 2000, Mark signed a quitclaim deed transferring ownership of the property to a business associate, Mark Tynan.

¶6 In October 2000, the Chisholms filed for bankruptcy. At a creditors’ meeting in January 2001, they testified under oath about their assets and liabilities. Maryanne testified that the three paintings were “stored in a safe place but . . . [were] no longer our property and ha[d] not been since June.” In early October 2000, however, she had borrowed \$42,500 from a friend for legal fees. She signed an agreement and promissory note secured by two of the paintings but backdated the note to June, before the receivership order. Maryanne never conveyed a bill of sale for the paintings. The Chisholms failed to make the payments on the promissory note, and the paintings were later seized and placed into the bankruptcy estate.

¶7 In 2001, the attorney for the receiver filed a petition to hold Mark in contempt of court for transferring the Tempe property in violation of the receivership court's order. Both Mark and Maryanne testified at the contempt hearing held in December 2001. The receivership court later found both of them in contempt for having testified falsely at that hearing, and Maryanne stipulated to the court's findings. Both the written stipulation and a video recording of the entire contempt proceeding were entered into evidence at trial in this case.

¶8 In April 2002, the state indicted Maryanne and Mark on charges of conspiracy and two counts of fraud in insolvency for failing to disclose to the receiver the paintings and the Tempe property. Maryanne also was charged with perjury. A second indictment issued in January 2003 against both Maryanne and Mark contained an additional charge of fraud in insolvency perpetrated against the bankruptcy trustee and a duplicate charge of fraud in insolvency relating to the paintings. The cases were later consolidated. Maryanne and Mark were tried together and waived their right to a jury. At the close of the state's case, the trial court dismissed the perjury charge and one fraud charge and, on jurisdictional grounds, struck from the conspiracy count any charges arising from the bankruptcy proceeding.

¶9 Mark then unsuccessfully moved for a mistrial, arguing the court should not consider any of the bankruptcy-related evidence already presented. Although the record does not reflect that Maryanne joined in the motion, she later raised that issue in a motion for new trial, which the court also denied. The court found her guilty on all remaining

charges, finding that the objects of the conspiracy were theft, perjury, and fraud in insolvency. This appeal followed.

Discussion

I. Sufficiency of the evidence

¶10 Maryanne first challenges the sufficiency of the evidence to sustain each of her convictions. In reviewing that issue, we “view the evidence in the light most favorable to sustaining the conviction[s], and all reasonable inferences will be resolved against a defendant.” *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). We will reverse a conviction on this ground “only if it is not supported by substantial evidence.” *State v. Ellison*, 213 Ariz. 116, ¶ 65, 140 P.3d 899, 916-17 (2006). “Substantial evidence is more than a mere scintilla and is such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

A. Fraud in insolvency: the three paintings

¶11 Maryanne was charged with having “committed fraud in insolvency by knowingly misrepresenting or refusing to disclose to the Court Appointed Receiver for Safari Media the location of three paintings.” *See* A.R.S. § 13-2206(A)(3). She contends the state failed to “legally prove[] its case” because the receivership order applied to Safari, not to Maryanne’s personal assets. Because Mark’s personal credit card was used to purchase the

paintings, Maryanne argues, she had no duty to disclose the paintings. Additionally, she contends the state failed to prove she “knowingly misrepresent[ed] or refus[ed] to disclose to a receiver . . . [the] location of the property,” as § 13-2206(A)(3) requires. We disagree.

¶12 An accounting expert testified that the Chisholms had used Safari funds to pay off Mark’s personal credit card. Out of the \$4.6 million paid to American Express, \$2.974 million came directly from Safari’s funds. The remaining payments came from the Chisholms’ personal checking account, ninety-eight percent of which consisted of direct transfers from Safari. Maryanne routinely wrote checks to herself from Safari’s account and deposited them in the Chisholms’ personal checking account. Based on that evidence, the trial court reasonably could have concluded that the paintings were subject to the receivership order because they were purchased with Safari funds. Additionally, the temporary restraining order pertained to Mark and Maryanne’s personal property as well as Safari’s property.

¶13 As noted earlier, the receivership court ordered the Chisholms to “deliver over to the receiver . . . [p]ossession and custody of all funds, assets, property owned beneficially or otherwise, and all other assets, wherever situated.” Ample evidence supported a finding that Maryanne misrepresented or refused to disclose the location of the paintings to the receiver.

¶14 First, she had the paintings shipped to a third party, Matt Farruggio, claiming she was “having some trouble at her house.” Next, she moved the paintings to a storage facility under the name of a former employee, “Beth Newsome,” who was unaware that her

name was on the agreement. Maryanne then drafted a sales agreement for two of the paintings, backdating the document to a time before the receivership order was entered and including “false information” in a letter because she “was afraid of the . . . receivership.” She also transferred ownership of the third painting to a “representational,” “skeleton” limited liability company, again backdating the agreement before June 2000 because the Chisholms did not “want the State to know that the artwork was involved.” Finally, in an electronic message to a man involved in the sale of the paintings, she wrote that he should “be VERY careful” because she “d[id] NOT want the receiver to touch [the paintings].” She went on to say she had “deliberately listed it so the receiver could not call up, get information, and steal or take it.” From this evidence, the trial court reasonably could find Maryanne had refused to disclose to the receiver the location of the paintings despite the receivership order.

B. Fraud in insolvency: Tempe property

¶15 Maryanne also challenges the sufficiency of the evidence on the second fraud in insolvency charge relating to the Tempe property. She was charged with “knowingly misrepresenting to the Court Appointed Receiver for Safari Media the sale of property located [in] . . . Tempe, Arizona.” *See* § 13-2206(A)(3). Maryanne signed a disclaimer deed before Mark bought the Tempe property, showing she was aware of Mark’s purchase and the existence of the property. Because Mark bought the residence as his sole and separate property and Maryanne had no ownership interest in it, however, she asserts she had no duty

to disclose its sale. She also argues she did not misrepresent or refuse to disclose to the receiver the property's existence or transfer. Again, we disagree.

¶16 The state presented evidence that Mark purchased the Tempe property with Safari funds. He wrote a check to the title agency for \$2500 from Safari's account and also transferred by wire \$53,489.14 from the company's funds. When the receiver discovered this, the receiver's counsel sent a letter to the Chisholms' attorney in August 2000, requesting they place the Tempe property into the receivership to avoid foreclosure and preserve the property's value. Instead, shortly thereafter, Mark quitclaimed the property to a business associate.

¶17 Viewed in the light most favorable to sustaining the conviction, the record supports a finding that Maryanne misrepresented that property transfer. In the receivership court's contempt hearing, she falsely testified that she had been unaware of the receivership order until November 2000, several months after Mark had signed the quitclaim deed. Contrary to that testimony, in July 2000 the lawyer who represented Safari at the time filed a formal acceptance of service on behalf of Maryanne, Mark, and Safari; and three of her attorneys testified at trial that she had been aware of the receivership order. An attorney who was present at the Chisholms' home in June 2000, on the day the court issued the receivership order, testified that he "gave [Maryanne] a copy [of the order] and explained it in detail to her," emphasizing "what the Chisholms could and could not do with their assets." That attorney also informed them at that time, two months before Mark transferred the property, that the receivership order was "very broad" and that it "effectively tied up all

of their assets.” Another of their attorneys testified it was “self-evident” that the receiver claimed everything belonging to the Chisholms. A third attorney who represented Safari explained to Maryanne at a meeting in July 2000 her “obligation to cooperate with the receiver” and not to hide or secret any “assets held by either of them or Safari Media.” The attorneys’ testimony supports an inference that Maryanne was aware of her obligation to disclose the Tempe property to the receiver. In fact, any ongoing contact between the attorneys and Safari took place “almost universally” with Maryanne, implying she was informed of the requirements of the receivership court’s order.

¶18 A letter between Maryanne and the attorneys also provided circumstantial evidence of her misrepresentation to the receiver. The August 2000 letter from the Chisholms’ attorney, addressed solely to Maryanne, referred to the receiver’s request that she “stipulate to the property being placed into receivership” in order to avoid foreclosure. Significantly, although that letter was not addressed to Mark, eight days later Mark signed the quitclaim deed transferring the property. Although circumstantial, this evidence supports an inference that she deliberately concealed Mark’s ownership interest in the Tempe property by encouraging him to transfer it instead of agreeing to place the property into receivership. “A conviction may be sustained on circumstantial evidence alone.” *State v. Green*, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975); *see also State v. Riley*, 12 Ariz. App. 336, 337, 470 P.2d 484, 485 (1970) (“Circumstantial evidence is the proof of the existence of some fact from which fact the existence of the thing in issue may be legally and logically inferred.”).

¶19 To the extent Maryanne suggests that a knowing misrepresentation requires an affirmative false statement rather than concealment or a failure to disclose, she failed to adequately develop any such argument on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Additionally, “[a] misrepresentation may consist of the concealment of what is true as well as the assertion of what is false.” *State v. Coddington*, 135 Ariz. 480, 481, 662 P.2d 155, 156 (App. 1983) (discussing misrepresentation in obstruction of criminal prosecution statute, A.R.S. § 13-2409); *see also State v. Carrasco*, 201 Ariz. 220, ¶ 11, 33 P.3d 791, 794-95 (App. 2001); *cf. Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, ¶ 14, 5 P.3d 940, 944 (App. 2000) (concealment of material fact is equivalent to misrepresentation in tort fraud context). From all of the circumstantial evidence, the trial court could reasonably infer that Maryanne not only knew of the Tempe property and its sale but also knowingly misrepresented the sale by concealing it from the receiver. Sufficient evidence supports the court’s finding Maryanne guilty of fraud in insolvency regarding the Tempe property.

C. Conspiracy

¶20 Maryanne next challenges the sufficiency of the evidence to support her conspiracy conviction. The trial court found the three objectives of the conspiracy were as charged in the indictment: theft, perjury, and fraud in insolvency. Maryanne contends the state failed to prove “an agreement between [her], [Mark], and/or unnamed others.” And she contends she could not have conspired to steal from the receivership because “the receiver did not own or have a right to own the paintings.” The record, however, contains sufficient evidence to support a finding on all three criminal objectives of the conspiracy.

¶21 Conspiracy requires an “(1) an intent to promote or aid the commission of an offense, (2) an agreement with one or more persons that one of them or another person will engage in conduct constituting the offense, and (3) an overt act committed in furtherance of the offense.” *State v. Newman*, 141 Ariz. 554, 559, 688 P.2d 180, 185 (1984), *citing* A.R.S. § 13-1003. The requisite “agreement may be proven by circumstantial evidence.” *State v. Willoughby*, 181 Ariz. 530, 540, 892 P.2d 1319, 1329 (1995).

¶22 Sufficient evidence supports the trial court’s finding of conspiracy to commit theft and fraud in insolvency. Maryanne argues that the receiver did not have an ownership interest in the paintings because they “went to the bankruptcy trustee and passed through bankruptcy.” A person commits theft by knowingly controlling “property of another with intent to deprive.” A.R.S. § 13-1802. “[P]roperty of another” is defined as “property in which any person other than the defendant has an interest on which the defendant is not privileged to infringe.” A.R.S. § 13-1801.

¶23 Although the paintings ultimately ended up in the bankruptcy estate, that fact does not mean the receivership had no valid ownership interest in the property, albeit an interest subordinate to the bankruptcy estate. The attorney who represented the receiver testified that he believed the paintings were receivership assets because the Chisholms had used corporate funds to purchase them. The use of corporate funds gave the receiver an ownership interest in the paintings, one that Maryanne was not “privileged to infringe,” § 13-1801, even if the paintings were ultimately placed in the bankruptcy estate.

¶24 Contrary to Maryanne’s argument, sufficient evidence supports the court’s findings of intent and acts committed in furtherance of theft and fraud in the insolvency. The same evidence that supported the fraud-in-insolvency convictions also supports the court’s findings on those points. Instead of disclosing her assets to the receiver, Maryanne had the paintings shipped to a third party, then moved them to a storage facility under a false name. Mark’s cooperation in forming the “representational” limited liability company and his signature on a November 2000 letter regarding the paintings demonstrated that he had worked cooperatively with her in concealing ownership of the paintings. Therefore, the evidence and reasonable inferences from it support the trial court’s finding beyond a reasonable doubt that Mark and Maryanne conspired to commit fraud in insolvency and theft.

¶25 As for the conspiracy to commit perjury, Maryanne argues the only proof is the perjurious act itself. Because her false testimony occurred in Maricopa County, she asserts, Pima County was not “the proper place for trial” pursuant to A.R.S. § 13-109(B)(7). Her argument fails, however, because the Pima County Superior Court did have jurisdiction over the conspiracy count. The statute allows a conspiracy charge to be tried “in any county in which any act that is an element of the offense, including the agreement in conspiracy, is committed.” § 13-109(B)(7). The trial court could reasonably have concluded that the agreement to lie under oath occurred in Pima County because both Maryanne and Mark resided there.

¶26 In addition, the similarity in Mark's and Maryanne's testimony at the December 2001 contempt hearing provides further evidence of their conspiracy to commit perjury. Mark testified at that hearing that he had not received the receivership court's order on June 30, 2000. Like Maryanne, he testified that he had not seen the receivership order until November 2000. Their testimony creates circumstantial evidence of an agreement to lie at the receivership court's contempt proceeding and, therefore, supports the trial court's finding of Maryanne's guilt on the conspiracy charge.

II. Prosecutorial Misconduct

¶27 Maryanne next argues the trial court erred in denying her motion to dismiss for prosecutorial misconduct in proceedings before the grand jury. Rule 12.9, Ariz. R. Crim. P., "is the exclusive avenue by which grand jury proceedings may be challenged" and sets a twenty-five day limit in which to do so. *State v. Fell*, 512 Ariz. Adv. Rep. 13, ¶ 9 (Ct. App. Sept. 7, 2007). Maryanne moved to dismiss in December 2004, contesting grand jury testimony given in April 2002 and January 2003. Because she did not object until nearly two years after the grand jury proceedings, the trial court dismissed the motion because it was clearly untimely.

¶28 We generally review a ruling on a motion to dismiss for an abuse of discretion. *State v. Mangum*, 214 Ariz. 165, ¶ 6, 150 P.3d 252, 254 (App. 2007). But "[t]o obtain review of a denial of redetermination of probable cause, a defendant must seek relief before

trial by special action.” *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995). Maryanne argues, however, she falls within the one exception to that rule: ““when a defendant has had to stand trial on an indictment which the government knew was based partially on perjured, material testimony.”” *State v. Moody*, 208 Ariz. 424, ¶ 31, 94 P.3d 1119, 1135 (2004), *quoting State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984). We disagree.

¶29 Referring to the January 2003 grand jury proceeding, Maryanne claims a police detective falsely testified that Safari funds had been used to purchase the paintings. The detective testified the paintings had been purchased with the “Chisholm[s]’ personal American Express card, but the funds that were paid for the American Express came from the Safari Media business.” As noted earlier, an accounting expert testified to the same effect at trial. Because the record does not establish that the indictment was based on any false testimony, we will not review on direct appeal the belated challenge to the grand jury proceedings long after those proceedings occurred and after the defendant has been tried and convicted. *See State v. Just*, 138 Ariz. 534, 541-42, 675 P.2d 1353, 1360-61 (App. 1983) (conviction after trial rendered moot any issue involving grand jury proceeding).

III. Sixth Amendment claim

¶30 Citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), Maryanne next claims her Sixth Amendment right to confront witnesses was violated when Mark’s hearsay statements were admitted into evidence. As the state correctly points out, however, Maryanne did not object on Sixth Amendment grounds during trial when the court

admitted the evidence.¹ Therefore, she forfeited this claim absent a showing of fundamental error and prejudice, neither of which she asserts. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005); *State v. Alvarez*, 213 Ariz. 467, ¶¶ 6-8, 143 P.3d 668, 670 (App. 2006).

¶31 Without citing the record, Maryanne vaguely asserts the trial court improperly admitted “[s]everal statements, prior testimony and e-mails” of Mark. She broadly mentions Mark’s testimony at the December 2001 contempt hearing and statements he made at the January 2001 meeting of creditors in the bankruptcy proceeding. We agree with the state that neither it nor this court “is responsible for constructing [Maryanne’s] claim of prejudice on appeal” or scouring the record for whatever evidence she might now find objectionable. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in [the record].”). In short, Maryanne fails to establish any error, let alone fundamental error, or prejudice in connection with her belated, unsupported Sixth Amendment claim.

IV. Admissibility of stipulation

¶32 Maryanne argues the trial court erroneously admitted into evidence “Petition 29,” a stipulation finding Mark and her in contempt of court in the civil proceeding brought

¹Although Maryanne fails to properly cite the record in support of this argument as required by Rule 31.13(c)(1)(iv) and (vi), Ariz. R. Crim. P., we note that she did make a Confrontation Clause argument in her post-trial motion for a new trial. But that motion came long after the evidence had been admitted. *See State v. Lichon*, 163 Ariz. 186, 190, 786 P.2d 1037, 1041 (App. 1989). And she does not challenge on appeal the trial court’s denial of that motion.

by the ACC against Safari. She contends that stipulation was a settlement agreement and, therefore, inadmissible under Rule 408, Ariz. R. Evid. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *State v. Hampton*, 213 Ariz. 167, ¶ 45, 140 P.3d 950, 961 (2006). We find no error.

¶33 Rule 408 excludes “[e]vidence of (1) furnishing or offering . . . or (2) accepting or offering or promising to accept, a valuable consideration in compromising . . . a claim which was disputed as to either validity or amount” for the purposes of proving liability. Our supreme court has held the rule does not prohibit evidence offered to impeach a party's credibility, in part because the rule's purpose is to foster candor between the parties during settlement negotiations. *Hernandez v. State*, 203 Ariz. 196, ¶¶ 13-14, 52 P.3d 765, 768 (2002).

¶34 Evidence at trial suggested both Maryanne and Mark had lied in the receivership proceeding about when they had become aware of the receivership order. Evidence of the stipulation was probative of their knowledge of the order and their awareness that the paintings and Tempe property belonged in the receivership as of June 30, 2000. This was not a case in which the stipulation was admitted to prove liability.

¶35 The trial court reasoned that the stipulated statements were “judicial admissions of the parties” and were “of a different nature and character than the typical offer of settlement or compromise contemplated by Rule 408 of the Arizona Rules of Evidence.” The court's conclusion was reasonable partly because, as it noted, “no language in the stipulation . . . attempted, in any way whatsoever, to qualify or limit the scope or application

of the stipulation, or to characterize it as a compromise or a settlement.” The court did not abuse its discretion in so ruling or in admitting the stipulation into evidence at trial.

V. Motion for mistrial

¶36 Maryanne asserts the trial court erred by denying her motion for mistrial and ruling it would consider the evidence from the bankruptcy proceeding “only in relation to the remaining counts” after it dismissed the bankruptcy-related charges. But she did not move for mistrial below. Although Mark did so, Maryanne did not join in his motion. Rather, she reserved her right to research and raise the issue separately later.² Thus, the issue was waived. *See State v. Bolton*, 182 Ariz. 290, 297-98, 896 P.2d 830, 837-38 (1995).

¶37 Even were the issue not waived, however, we would find no error. Maryanne contends that, after the bankruptcy-related charges were dismissed, the trial court could not possibly “segregate evidence as to the dismissed counts and the remaining counts.” She also argues the court “did not identify what [bankruptcy-related] evidence it would still consider” and conducted no analysis under Rule 404(b), Ariz. R. Evid., to authorize admission of the evidence as “prior bad acts.” Rule 404(b) does not preclude the evidence of the bankruptcy proceeding and creditors’ meeting because that evidence was not offered to prove

²Again, Maryanne first argued the erroneous admission of the bankruptcy evidence in her motion for new trial, which the trial court denied. And, as noted earlier, she has not challenged that ruling on appeal.

Maryanne’s character. Instead, it was offered to show notice of the receivership order and her statements regarding the paintings, which remained an issue in the case.

¶38 The trial court did not abuse its discretion by considering the evidence. In its ruling, the court described “its obligation to segregate information which it has now ruled is not viable for a particular purpose . . . from information which is still . . . properly in the record.” To the extent any evidence was inadmissible, “[w]e presume the trial court disregards all inadmissible evidence in reaching a decision.” *State v. Djerf*, 191 Ariz. 583, ¶ 41, 959 P.2d 1274, 1286 (1998). The court was well aware of its obligation and did not abuse its discretion in considering the evidence in question only for limited purposes and according that evidence whatever weight the court deemed appropriate.

VI. Constitutionality of A.R.S. § 13-2206

¶39 Finally, we address Maryanne’s constitutional challenge to A.R.S. § 13-2206 on vagueness grounds.³ Subsection (A)(3) of that statute, under which she was convicted, provides:

A person commits fraud in insolvency if, when proceedings have been or are about to be instituted for the appointment of a trustee, receiver or other person entitled to administer property for the benefit of creditors or when any

³The state argues Maryanne failed to raise this issue below and, therefore, must establish fundamental error and prejudice. Although she fails to cite where in the record the argument was made, we find she did raise the issue during closing argument and again in her motion for new trial. Regardless, when a defendant claims “a statute is unconstitutionally vague, we may consider that claim for the first time on appeal.” *State v. Lefevre*, 193 Ariz. 385, ¶ 15, 972 P.2d 1021, 1025 (App. 1998).

other assignment, composition or liquidation for the benefit of creditors has been or is about to be made, such person:

. . . .

Knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors the existence, amount or location of the property or any other information which he could be legally required to furnish to such administration.

¶40 When “reviewing the constitutionality of a statute, we are guided by a strong presumption that the statutory provision is constitutional.” *State v. Lefevre*, 193 Ariz. 385, ¶ 18, 972 P.2d 1021, 1025 (App. 1998). A statute is void for vagueness “if it fails to give persons of average intelligence reasonable notice of what behavior is prohibited or is drafted in such a manner that it permits arbitrary and discriminatory enforcement.” *State v. Steiger*, 162 Ariz. 138, 141, 781 P.2d 616, 619 (App. 1989); *see also State v. Brown*, 207 Ariz. 231, ¶ 16, 85 P.3d 109, 115 (App. 2004). But “[a] statute is not unconstitutionally vague solely because it fails to explicitly define one of its terms or because the provision is susceptible to more than one interpretation.” *Lefevre*, 193 Ariz. 385, ¶ 18, 972 P.2d at 1026.⁴

¶41 Maryanne contends the statute is vague because it “provides no notice as to what property is subject to criminal liability” and fails to describe how the statute applies

⁴The state does not challenge Maryanne’s standing to assert her void-for-vagueness claim presumably because, having been convicted under the statute, she would have “suffered some threatened or actual injury from the alleged constitutional infirmity.” *Lefevre*, 193 Ariz. 385, ¶ 16, 972 P.2d at 1025.

to a receivership. She essentially argues the statute does not make clear that failing to disclose her personal property to the receiver would subject her to criminal liability. “Property” is defined in A.R.S. § 13-105(32) as “anything of value, tangible or intangible.” The three paintings and real property in Tempe qualify as tangible items of value. Therefore, they were covered by the statute. Even though § 13-2206 does not differentiate between personal and corporate property, a reasonable person would believe she should disclose both types of property when a receiver seizes her assets.

¶42 The Arizona Corporation Commission investigated the Chisholms because corporate funds were being used to purchase personal assets and pay off personal credit cards. When the Maricopa County Superior Court appointed a receiver, it ordered Mark and Maryanne to deliver possession of all funds and assets “wherever situated.” Section 13-2206(A)(3) makes it a crime to “[k]nowingly misrepresent[] or refuse[] to disclose to a receiver . . . [the] amount or location of the property.” The statute’s wording would put a reasonable person on notice of the need to disclose to the receiver all assets, and all property of any kind in which the person has an interest, personal and otherwise, to the receiver. The knowing failure to do so subjects a person to criminal liability. We do not find the statute unconstitutionally vague as applied to Maryanne.

Disposition

¶43 We affirm the convictions and probationary terms imposed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PETER J. ECKERSTROM, Judge